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No. 260

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

HYMEN MILLER, MILDRED MILLER, his wife, and CHICAGO TITLE AND TRUST COMPANY, as Trustee under Document No. 16897045,

Appellants,

VS.

CITY OF CHICAGO, a municipal corporation,

Appellee.

Appeal from the Supreme Court of Illinois

JURISDICTIONAL STATEMENT

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OPINIONS BELOW

The opinion of the Trial Judge is reproduced in Appendix I herein.

The opinion of the Supreme Court of Illinois is reported in 27 Ill. 2d 211, and is reproduced in Appendix I herein.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

On July 27, 1961, the plaintiff, City of Chicago, filed a Complaint in the Circuit Court of Cook County against the defendants Hymen Miller, Mildred Miller, his wife, and Chicago Title and Trust Company, as Trustee, seeking a mandatory injunction to enforce a building ordinance of the City of Chicago (Tr. 3; Abst. of Rec. 1-9). The defendants filed an Answer wherein, among other things, the defendants pleaded that the ordinance herein involved was "null and void, being in direct violation of due process of law as guaranteed to the owners of said property by . . . Section 1 of the Fourteenth Amendment to the Constitution of the United States" (Tr. 3; Abst. of Rec. 11-12), and "That defendants are denied the equal protection of the law as provided in the Fourteenth Amendment to the Constitution of the United States" (Tr. 3; Abst. of Rec. 13). The trial court passed upon said constitutional question and held said ordinance constitutional (Tr. 3; Abst. of Rec. 65-78). The trial court issued a mandatory injunction and the defendants prosecuted an appeal to the Supreme Court of Illinois (Tr. 3; Abst. of Rec. 19-20).

The judgment of the Supreme Court of Illinois affirming the trial court was rendered on February 1, 1963 (Tr. 12), rehearing was denied by the Supreme Court of Illinois on March 27, 1963 (Tr. 13), and Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of Illinois on May 27, 1963 (Tr. 16-20).

Title 28 of the United States Code, Section 1257(2), provides that review may be had by appeal to the Supreme Court of the United States from a final judgment or decree rendered by the highest court of a state where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution of the

United States and the decision is in favor of its validity. In the case at bar, the validity of a municipal ordinance was involved on the ground of its being repugnant to the Constitution of the United States, and the decision of the Supreme Court of Illinois was in favor of its validity (Tr. 5-11).

The following cases hold that for the purpose of jurisdiction of the Supreme Court of the United States a municipal ordinance is a state statute: *King Mfg. Co.* v. *Augusta*, 277 U.S. 100 (1928); *Jamison* v. *Texas*, 318 U.S. 413 (1943); *Breard* v. *Alexandria*, 341 U.S. 622 (1951).

Sections 46-2, 46-5, 48-2.2, 52-1, 52-2, 66-5, 66-5.1, 66-5.7, 8, 9 and 10, 78-10.2, 78-11.1, 78-13.1, 2, 3, 4 and 6, 82-2 and 82-12 of the Municipal Code of Chicago, the ordinances herein involved, are set out in Appendix II herein.

QUESTIONS PRESENTED BY THIS APPEAL

(Tr. 19-20)

The following questions are presented by this appeal:

1. Where a municipal corporation has in effect an ordinance regarding multiple-dwellings which requires one bathroom "to serve not more than 10 persons" and the general requirement nation-wide, is one bathroom for 10 persons, may the municipal corporation pass an ordinance that "The occupants of not more than two family units which are located in the same dwelling may share a single" bathroom and enforce the last-mentioned ordinance against property owners of a three-story building which contains 22 dwelling units, having 12 bathrooms, occupied by 29 persons, 7 of said dwelling units having private bathrooms and 15 dwelling units, of 1 and 2 rooms each, share 5 bathrooms, all of which 5 bathrooms are available to the occupants of the 15 dwelling units, or is the last-mentioned

municipal ordinance which requires bathrooms according to number of rooms, rather than according to number of persons who are to use the bathrooms, an unnatural classification and purely arbitrary, being in violation of "due process of law" and "equal protection of the laws" as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States?

2. Where a municipal corporation has, in the year of 1949, passed an ordinance requiring every building or part of a building thereafter designed, erected, altered or converted for the purpose of a residential unit to have one-hour fire resistive materials on walls and partitions separating dwelling units and enclosures of corridors, and doors to corridors, to be 1¾ inch solid flush wood panel type or its equivalent, which ordinance is expressly made prospective only, may the municipal corporation, by subsequent ordinance passed in the year of 1956, make the 1949 ordinance retroactive as to all existing buildings, or are the retroactive provisions of the 1956 ordinance invalid, being in violation of "due process of law" as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE.

The three-story building herein involved is located at 4051-53 North Kenmore Avenue, in Chicago, and was constructed in 1899 under a permit of the Building Department of the City of Chicago (Tr. 3; Abst. of Rec. 32). The ordinance of the City of Chicago requires the Commissioner of Buildings of the City of Chicago, and his assistants, to make "an annual inspection" of the building and if "the result of such inspection shall show that such building failed in any respect to comply with the building provisions of this code, it shall be the duty of the commissioner of buildings to notify the owner, agent, lessee, or occupant of such building to this effect and to specify wherein such building fails to comply with such requirements of the building provision of this code" (Appendix II herein). From 1899 to and including 1960, a period of 62 years, the Commissioner of Buildings did not notify anyone of any failure of the building to comply with the Building Code.

In 1957, the defendant, Hymen Miller, became interested in the purchase of the building (Tr. 3; Abst. of Rec. 54). He went to the Building Department of the City of Chicago, advised the person in charge of the Building Department that he (Miller) was interested in purchasing the building, and that he would not purchase it if there were any violations against the building (Tr. 3; Abst. of Rec. 54-55). The person in charge of the Building Department examined the records of the Building Department and advised the defendant (Miller) that there were inspection records and that the building was in good order (Tr. 3; Abst. of Rec. 54-55). In reliance thereon, Miller purchased the building for $40,000.00 (Tr. 3; Abst. of Rec. 56).

On May 26, 1958, A. H. Zimmerman, Assistant to the Commissioner of Buildings of the City of Chicago (Tr. 3; Abst. of Rec. 59), who was in direct charge of the "Task Force", which means "a co-ordinated inspection by a team of inspectors" (Tr. 3; Abst. of Rec. 63), made an "evaluation record" (Tr. 3; Abst. of Rec. 64). Said record shows "no referral" (Tr. 3; Abst. of Rec. 64), that is, on May 26, 1958, the building was not referred to the Bureau of Housing Inspection; it was not referred to the Bureau of Plumbing Inspection; and it was not referred to the Fire Prevention Bureau (Tr. 3; Abst. of Rec. 64).

The defendants pleaded that the ordinance herein involved was "null and void, being in direct violation of due process of law as guaranteed to the owners of said property by . . . Section 1 of the Fourteenth Amendment to the Constitution of the United States" (Tr. 3; Abst. of Rec. 11-12), and "That defendants are denied the equal protection of the law as provided in the Fourteenth Amendment to the Constitution of the United States" (Tr. 3; Abst. of Rec. 13).

The trial court passed upon said constitutional question and held said ordinance constitutional (Tr. 3; Abst. of Rec. 65-78).

The Supreme Court of Illinois affirmed the trial court and said (Tr. 8-9):

> "We turn now to a consideration of the principal issue, which is the validity of the ordinances involved here. In general, these sections of the municipal code impose certain requirements with respect to ventilation of kitchens, the sufficiency of the sanitary facilities, the venting of certain plumbing fixtures, and the fire-resistant qualities of the walls, partitions and doors. The code provides that these provisions are applicable to all buildings, including those built before the effective date of the ordinance."

Continuing (Tr. 9), the Supreme Court of Illinois said:

> "The real issue involved here is whether these building requirements can constitutionally be made applicable to existing buildings."

Continuing (Tr. 10), the Supreme Court of Illinois said:

> "We hold that the city in the exercise of its police powers as conferred by the legislature had the authority to enact the provisions involved here and also had the authority to make such provisions applicable to existing buildings.
>
> "The defendants also argue that one of these provisions, dealing with the number of bathrooms in a building, is unconstitutional because it is based upon an arbitrary and improper classification. This section provides that the occupants of not more than two family units which are located in the same dwelling may share a single bathroom. The building contains 22 units, 7 of which have private bathrooms, and 15 of which share 5 other bathrooms. The defendants contend that classification according to the number of rooms rather than to the number of persons who are to use the bathroom is an unnatural classification and is purely arbitrary."

The Supreme Court of Illinois concluded (Tr. 11):

> "We have considered all of the assertions of error advanced by the defendants and are of the opinion that the decree of the trial court was correct. The decree is therefore affirmed."

FEDERAL QUESTION IS SUBSTANTIAL

A. As to sanitary facilities

The three-story building herein involved contains 22 dwelling units and has 12 bathrooms and is occupied by 29 persons (Tr. 3; Abst. of Rec. 29, 31). Thus, there is an average of more than one bathroom for each 2½ persons. The general requirement, nation-wide, is one bathroom for 10 persons (Tr. 3; Abst. of Rec. 44), and an

ordinance of the City of Chicago, still in effect, as to multiple-dwellings requires one toilet facility "to serve not more than 10 persons" (Municipal Code of Chicago, Section 66-5.7(a)(2); Appendix II herein). In conflict with the above provision, the ordinance of the City of Chicago, enacted June 20, 1956, requires that "The occupants of not more than two family units which are located in the same dwelling may share a single" bathroom (Municipal Code of Chicago, Section 78-13.4; Appendix II herein).

The requirement of bathrooms according to number of rooms, rather than according to the number of persons who are to use the bathrooms, is an unnatural classification and purely arbitrary.

The City of Milwaukee had passed a retroactive ordinance regarding bathrooms almost identical with the ordinance involved in the case at bar. In *Brennan* v. *City of Milwaukee*, 265 Wis. 56 (1953), the Supreme Court of Wisconsin held said ordinance unconstitutional, and said at pages 56-58:

> "Considering that the protection of public health through promoting personal cleanliness is the object to be accomplished, does the differentiation between a three-room apartment and a four or five or six-room apartment on the basis of number of rooms have a reasonable bearing upon that object? Number as a factual basis is properly used for the purpose of classification when it bears a real relation to the object to be accomplished. An analysis of the two ordinances requiring, in the case of a three-room apartment, only one bath to two apartments, and, in the case of any apartment over three rooms, a private bath, reveals that what the ordinance is actually concerned with is the number of persons using a bath. In the case of rooming houses, the differentiation between a rooming house having fifteen roomers or under and a rooming

house having over fifteen roomers is a logical classification as between rooming houses. It limits the number of persons who may use one bath and thus affects the opportunity for cleanliness of each roomer, because the facilities are measured in terms of the number of persons using them. This is not the case with the ordinances classifying apartment houses. These ordinances assume or imply that there are fewer occupants in a three-room apartment than in a four or five or six-room apartment. Yet it is admitted that there may be as many occupants in a three-room apartment as in a six-room apartment. If personal cleanliness is the purpose to be attained and the number of rooms is not a rational index to the number of people who occupy them, then the differentiation cannot be reasonably based on the number of rooms. If a three-room apartment contributes to an alleged danger or evil in the same way and to the same extent as an apartment consisting of a greater number of rooms, there is no reasonable classification on the basis of rooms.

"The limitation of legislative power to classify is that the classification shall be based upon some natural reason, 'some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them.' *State ex rel. Risch* v. *Trustees* (1904), 121 Wis. 44, 54, 98 N.W. 954. The classification by number of rooms is not a natural classification for the purpose to be accomplished, *i.e.*, personal cleanliness, affecting public health, where the number of occupants cannot be determined, for it is the occupants who are to be affected by the health regulation. Therefore the classification of sec. 75-4 of the Milwaukee Code is not based upon a substantial distinction which makes one class really different from another or which bears reasonably upon the object to be sought.

"It is, therefore, our considered conclusion that the ordinance offends the equal-protection-of-the-laws clause of the Fourteenth amendment to the United State Constitution, and is void for that reason. There-

> fore, plaintiffs are entitled to the injunction prayed for in their complaint restraining the defendant city and its commissioner of health from enforcing the ordinance against plaintiffs and their property."

Thus, a conflict now exists between the decision of the Supreme Court of Wisconsin and the decision in the case at bar by the Supreme Court of Illinois as to the proper construction of the Fourteenth Amendment to the Constitution of the United States.

B. As to walls and partitions

We believe that a restatement of some of the material facts is appropriate in considering the issue as to the walls and partitions.

The three-story building herein involved is located at 4051-53 North Kenmore Avenue, in Chicago, and was constructed in 1899 under a permit of the Building Department of the City of Chicago (Tr. 3; Abst. of Rec. 32). The ordinance of the City of Chicago requires the Commissioner of Buildings of the City of Chicago, and his assistants, to make "an annual inspection" of the building and if "the result of such inspection shall show that such building failed in any respect to comply with the building provisions of this code, it shall be the duty of the commissioner of buildings to notify the owner, agent, lessee, or occupant of such building to this effect and to specify wherein such building fails to comply with such requirements of the building provision of this code" (Appendix II herein). From 1899 to and including 1960, a period of 62 years, the Commissioner of Buildings did not notify anyone of any failure of the building to comply with the Building Code.

In 1957, the defendant, Hymen Miller, became interested in the purchase of the building (Tr. 3; Abst. of Rec. 54). He went to the Building Department of the City of Chicago, advised the person in charge of the Building Department that he (Miller) was interested in purchasing the building, and that he would not purchase it if there were any violations against the building (Tr. 3; Abst. of Rec. 54-55). The person in charge of the Building Department examined the records of the Building Department and advised the defendant (Miller) that there were inspection records and that the building was in good order (Tr. 3; Abst. of Rec. 54-55). In reliance thereon, Miller purchased the building for $40,000.00 (Tr. 3; Abst. of Rec. 56).

It is common knowledge that rebuilding of walls and partitions of an established structure requires a major change and involves great expenditure. To require the owner of an established building to rebuild it in accordance with subsequent enactments involves the deprivation of a property right, in violation of "due process of law".

A similar situation was before this court in *Dobbins* v. *Los Angeles*, 195 U.S. 223, wherein the City Council of the City of Los Angeles had adopted an ordinance making it unlawful to erect and maintain gas works outside of a certain district described in the ordinance. Afterward Caroline W. Dobbins purchased land within the limits of the district fixed by the ordinance and contracted for the erection of gas works upon those premises. Thereupon the city council passed a second ordinance, amending the first by limiting the boundaries of the territory within which the erection of gas works was permitted so as to exclude the premises of Caroline W. Dobbins. The construction of the works was prosecuted after the passage of the second ordinance until the city caused the employees engaged in the erection of the gas works to be arrested for a violation of the city ordinance and made repeated

arrests. The owner of the property then filed a bill for an injunction to restrain the enforcement of the amended ordinance. This court said at page 241:

> "In this case we think the allegations of the bill disclose such character of territory, such sudden and unexplained change of its limits after the plaintiff in error had purchased the property and gone forward with the erection of the works, as to bring it within that class of cases wherein the court may restrain the arbitrary and discriminatory exercise of the police power which amounts to a taking of property without due process of law and an impairment of property rights protected by the fourteenth amendment to the Federal Constitution."

Where it is asserted that a person has been deprived in a state court of a fundamental right secured by the Constitution of the United States, the Supreme Court of the United States makes an independent examination of the facts. *Craig* v. *Harney*, 331 U.S. 367 (1947); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *Feiner* v. *New York*, 340 U.S. 315 (1951); *Napue* v. *Illinois*, 360 U.S. 264 (1959).

ORDER APPEALED FROM

The judgment of the Supreme Court of Illinois from which this appeal is prosecuted is set out in Appendix III herein.

Respectfully submitted,

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By .....

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APPENDIX I

OPINION OF TRIAL JUDGE

(Tr. 3; Abst. of Rec. 65-78)

This action is brought by the City of Chicago, a Municipal Corporation, Plaintiff, against Hymen Miller, Mildred Miller, his wife, and Chicago Title and Trust Company, as Trustee under Document #16897045, as Defendants, for injunction and other relief. This suit is brought under Section 23-70.3 of the Cities and Villages Act, (Illinois Revised Statutes 1959), for violation of the Municipal Code of the City of Chicago, in a certain building located at 4051-53 North Kenmore Avenue, Chicago, Illinois, which code sets up minimum standards of fire, health and safety for multiple dwellings in the City of Chicago, Illinois.

Paragraph 8 of said complaint refers to Zoning Ordinances; however, no zoning violation is charged in the complaint and no issue of deconversion is raised.

Suit was filed on July 27, A.D., 1961, and the defendants have entered their appearances and filed pleadings and the record shows a number of continuances have been had in this cause at the request of the defendants.

The defendants' amended answer to complaint denies each of the allegations charging violations of the Municipal Code and sets up various affirmative matters in the way of confession and avoidance of allegations in the complaint. Plaintiff has filed a reply denying the allegations in said amended answer. At the close of the plaintiff's case, defendants rested and offered no evidence. The defendants contend that Plaintiff cannot prove and uphold their case for the following reasons:

That the Court does not have jurisdiction of the subject matter because the plaintiff has not established by the evidence proofs required to support equitable relief under Section 73-1, Chapter 24 Ill. Rev. Statutes, 1959; that the City is estopped to enforce the health and safety standards set forth in the Municipal Code of the City of Chicago, Illinois; that the City is barred and ought not be able to recover because of laches of the City in prosecuting this cause of action; that said Ordinance is contrary to the express provisions of Section 73.1, Chapter 24, Ill. Rev. Statutes, 1959; that said provision of the Municipal Code constitutes a violation of the 5th and 14th amendments of the Constitution of the United States of America and Section 13 of Article II of the Illinois Constitution.

The defendants offered no evidence in support of their affirmative matters and elected to stand on the last mentioned defenses presented.

The plaintiff's evidence tends to prove, in regard to the building in question, the following:

1. That Sections 78 10.2, 52.2 and 78 11.1 of the Municipal Code of the City of Chicago have been violated in that materials in partitions separating dwelling units and enclosures of corridors are of substandard fire resistive materials, and that doors to corridors from the apartments fail to comply with code specifications.

2. That Sections 78.14 and 81.7 of the Municipal Code of the City of Chicago have been violated for the reason that kitchens in efficiency units listed in complaint have inadequate ventilation.

3. That additional sanitary facilities for apartments listed in complaint on each floor must be installed to comply with Sections 78 13.1, 78 13.2, 78,13.3, 78 13.4, 78 13.6, 82 12, 82 17, and 82 117 of the Municipal Code of the City of Chicago, Illinois.

4. That it is necessary, in order to comply with Section 66 5.5 of the Building Code of the City of Chicago, Illinois, that lavatories be installed in apartments 105, 111, 211, 305 and 311 in the multiple dwelling units listed in complaint.

5. That qualified experts testified that there is a reasonable relationship between the various regulations and the health and safety of the occupants of the building.

6. That evidence also tends to show that the original construction of the building had been altered without obtaining any permit from the Building Department of the City of Chicago, Illinois, and further tends to show that the original construction of the building had been altered and increased from six (6) to twenty-two (22) dwelling units.

The defendants offered no evidence to contradict any of said evidence or to support any of their affirmative allegations, but stood on the legal propositions as presented heretofore.

The issues in this case can be outlined as follows:

First: Did the City have statutory authority to enact the aforesaid provisions of the Municipal Code, and, if so, what is their nature and effect?

Second: Are the provisions of said Code, as an exercise of said authority, valid as against the constitutional provision "That no person shall be deprived - - - - property without due process of law". (Ill. Const. Article II Section 2), and that "Private property shall not be taken or damaged for public use without just compensation", (Article II Section 13). This involves a question of whether the said provisions of the Code, both on its face and as it is applied to the facts here, is a reasonable exercise of

police power. Also are said provisions of the Code contrary to the Due Process and Equal Protection of Law Clause of the 14th Amendment to the United States Constitution.

Third: Is this action subject to any of the other defenses raised by defendants in their closing arguments?

a. That this Court does not have equitable juridiction of the subject matter under the proofs presented in this case.

b. That the City is estopped to enforce the provisions of the aforesaid provisions of the Municipal Code of the City of Chicago, Illinois.

c. That the City is barred and ought not to recover by virtue of laches under the facts presented by the plaintiff's case.

d. That the wording of the Code is retroactive and therefore contrary to Section 73.1, Chapter 24, Ill. Rev. Statutes, 1959.

In covering these points, did the City of Chicago, Illinois have the statutory authority to enact aforesaid provisions of the Municipal Code?

Under Sections 70 and 72, Article 23, Chapter 24, Ill. Rev. Statutes, the legislature has delegated to the Cities and Villages the power and authority to protect the lives and safety of their citizens from the dangers of fire, and,

Under Section 81, Article 23, Chapter 24, Ill. Rev. Statutes, the City has been delegated authority to promote the health of their population and protect them from disease.

The provisions of the Code involved in this case now before us are unquestionably health and safety regulations enacted for the purpose of promoting the health and protecting the occupants of the building, subject to the regulations contained therein; it being clear that the health, safety and welfare of the occupants of the multiple dwelling units should be subservient and protected by the provisions of the Code in question. The same are therefore police regulations, within the power of Sections 70, 72, 81 and 105 of Article 23 of the Revised Cities and Villages Act, (Ill. Rev. Statutes, 1959). Under the above powers the Supreme Court of Illinois has held that the City has the power to regulate storage of combustible materials and make fire regulations for a dry cleaning business. *Klever Shampay Karpet Kleaners, Inc.*, v. *City of Chicago*, 323 Ill. 368; to make regulations for business of establishing heating plants, *City of Chicago* v. *Wonder Heating and Ventilating Systems*, 345 Ill. 496. Under the authority of Article 23-81 to promote health, Cities are authorized to regulate laundries. *Ruban* v. *City of Chicago*, 330 Ill. 97 and the Supreme Court of Illinois has held that when the City Council, as a legislative body of a Municipality, considers some things dangerous to health, and in the exercise of its discretion adopts regulations to prevent such danger, it is a policy of law to favor such legislation. *Biffer* v. *City of Chicago*, 278 Ill. 562, and *Gundling* v. *City of Chicago*, 176 Ill. 340, and the most important of the police powers is that of protecting the safety and health of the Community. The City has ample authority to enact code regulations such as are in question as a health or safety measure, under express powers granted under Article 23, Chapter 24, Ill. Rev. Stat., 1959, as the authority for the passage of an Ordinance need not be wholly derived from a single grant of power by the Legislature, but may be derived from several different grants of powers. *City of*

Bloomington v. *Wirrick*, 318 Ill. 374, *Father Basil's Lodge* v. *the City of Chicago*, 393 Ill. 246; *City of Chicago* v. *R. X. Restaurant*, 369 Ill. 65. This is a suit under Section 23-70.1 to enjoin violations of the Health and Safety Code and is not a suit under Section 73.1 or 73.9 to enforce zoning Ordinances as contended by the defendants. The reference in the complaint to a zoning ordinance is a mere surplusage for the reason no deconversion is charged.

Second: Are the provisions of the code valid against the Constitutional objections?

Individual use of property is subject to the public health and safety requirements of the Police Power Action. *Trust Company of Chicago* v. *City of Chicago*, 408 Ill. 91. Anything which is hurtful to the public interest is subject to the police power and may be restrained and prohibited in the exercise of that power. *Father Basil's Lodge* v. *City of Chicago*, 393 Ill. 246; *Gundling* v. *City of Chicago*, 176 Ill. 340 affirmed in 177 U.S. 1831, 20 S.C.T. 633 and our Courts hold that the legislature and City Councils in the exercise of the Police Power may prohibit all things hurtful to the health and safety of society, even though the prohibition invades the right of liberty or property of an individual. *Adkins* v. *City of West Frankfort*, 51 F. Supp. 532; *City of West Frankfort* v. *Fullop*, 6 Ill. 609. Neither the 14th Amendment to the Federal Constitution nor any provisions of our state constitution were designated to interfere with the Police Power of the Municipality to enact laws to protect the health and general welfare of the people. *People* v. *Anderson*, 355 Ill. 289; *C. B. & Q. Ry. Co.* v. *the People*, 212 Ill. 103 at 116.

It has been held by the Supreme Court of Illinois that where there may be a fair debate as to the need for the regulation the legislative judgment exercised by the City Council will be respected. *City of West Frankfort* v. *Fullop*, 6 Ill. 609 at 614.

Our Local Government is still the structure in our society that must promote the health and welfare of our people. The burden is great and Local Government power to function depends upon its police power. It must not be nullified and in respect to health and safety of our people; the police power is the first law of our society. "The exercise of the police power", said Justice Harlin, "by the destruction of property which is a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from the taking of property for a public use, or from depriving a possessor of property, without due process of law." *Mugler* v. *Kansas*, 123 U.S. 623, 31 L. Ed. 205.

Actually, it is the law that Ordinances are presumed to be valid, and it is incumbent upon the party attacking an Ordinance as being unreasonable to show affirmatively wherein the unreasonableness consists. *People* v. *Village of Oak Park*, 266 Ill. 365, *City of Chicago* v. *Water*, 363 Ill. 125, and in the absence of evidence to the contrary, the Legislative Judgment of the City Council is conclusive, *Dunlop* v. *City of Woodstock*, 405 Ill. 410, *Neef* v. *Springfield*, 380 Ill. 275.

In view of the above rules of law and on the evidence offered in this case by the Plaintiff, the position of the Defendants that the provisions of the code are in violations of the Due Process Clause and the Equal Protection of Law Clause, of either the State or of the Federal Constitutions, as being unreasonable and arbitrary action of a Legislative Body is not logical. The provisions of the code have a clear relationship between the Legislative purpose of said Code to promote the health and safety of the citizens of the City of Chicago, as shown by clear and convincing evidence of experts in these fields.

In covering the various matters under the Third Point:

(A) Does this Court have equitable jurisdiction of this cause from the proofs made in this case?

The applicable Sections of the Statute, referred to in the Complaint (Section 23-70.3, Chapter 24, Ill. Rev. Stat., 1959), specify that when a building fails to conform to certain minimum standards of health and safety, an injunction requiring compliance may be sought of the owner or owners who fail to cause their property to so conform. The action providing for violation of zoning is covered under Section 23-73.1, Chapter 24, Ill. Rev. Stat., 1959. Therefore, this suit is properly brought under the correct section, and not controlled by the zoning section as no deconversion has been alleged, or proven. The only Statutory requirement in this section is that the appropriate official of any municipality must investigate and determine when any building does not conform to the minimum standards of health and safety applicable to any ordinance, and give notice to the owner. Although the complaint alleges matters of extreme emergency and imminent danger, such requirements are not essential and are mere surplusages. The remedy by injunction in this instance is given by Statute and predicated upon the equitable principle upon the proposition that it is given to prevent a multiplicity of suits and prevent, as in cases of this type, a defendant persisting in perpetrating unlawful acts and violations which make the legal remedy inadequate. *Drainage Comm'rs of Sub-District Number 1 of Drainage Union Dist. No. 1* v. *Russell*, 336 Ill. App. 604. *Green* v. *Mail*, 362 Ill. 518. Therefore, the contention that this Court does not have equitable jurisdiction must be rejected.

(B) Is the Plaintiff estopped to bring this action?

When we examine the record in this cause we find that Hymen Miller had constructive notice of the provisions of the code. The provisions of the code were in full force and effect as to existing buildings in 1957 when he purchased the building which is the subject-matter of this cause of action. He bases estoppel on the bare fact that he went to the Building Department of the City of Chicago and had a talk with some person there as to whether or not to buy the property. He states that he does not know to whom he talked. The general rule is that a City cannot be stopped by an act of its agent beyond the authority conferred upon him. *Rippinger* v. *Niedorst,* 317 Ill. 364. Any one dealing with a governmental body takes the risk of having accurately ascertained that he who purports to act for same stays within the bound of his authority, and that is so even though the agent may have been unaware of the limitation of his authority. *Federal Ins. Corp.* v. *Merrill,* 332 U.S. 380, 384, 92 Led. 10, 15. This is subject to an exception in cases where a corporate officer makes an affirmative representation upon basis amounting to a misrepresentation upon which the party claiming estoppel relied, under circumstances on which he would have a right to rely. Such is not the evidence in case at bar. No permits were shown, to have been issued, or other affirmative action taken by any Board or Corporate Officer of the City. Since the Defendants did not attempt to prove any authority in the alleged person in the building department to whom Mr. Miller states he had spoken, and fails to make any affirmative showing either in the pleading or proofs of any facts that would come within the alleged exception aforesaid, this contention for estoppel must fall from its own weight.

(C) Is the City of Chicago barred from maintaining this action on-account-of Laches?

Laches does not run against the City when it is performing under its governmental functions. The maxim "*nullum tempus occuit regi*" means in effect that the doctrine of laches does not apply against a unit of government, such as a municipality, and is restricted to public rights of the governmental agent, and does not apply to contract or other non-governmental rights. *Village of Hartford* v. *First National Bank of Wood River*, 307 Ill. App. 447. There is no evidence in this case showing that the Defendant spent any large sums of money other than the purchase price of this property. At the time Hymen Miller bought this property he was charged with notice of the provisions of the Municipal Code of the City of Chicago. Laches has been held to constitute no bar to maintenance of an action for an injunction to prevent sources of injuries to health. *Shelby Loan and Trust Co.* v. *White Star Refining Co.*, 271 Ill. App. 266. *City of Springfield* v. *North Fork Outlet Drainage Dist.*, 249 Ill. App. 27.

In the early case of *Fertilizer Company* v. *Hyde Park*, 97 U. S. 659, 1878, the Legislature of the State of Illinois had charted a company with the right of manufacturing fertilizers within the state, no limits being set as to location of the company's plant. The factory having been situated in the suburb of Chicago, and the population having grown-up around the plant, some complaint was made to the local sanitary authority that the factory caused noxious odors injurious to health. The Supreme Court of the United States held that the local authority had the rights to cause said Plant to be moved because of threatened injury to the health of the citizens. The Court held that an action could be maintained even after the long lapse of time.

Laches do not bar action under the Police Power under proofs and pleadings on which this suit was brought.

(D) Are the provisions of Section 73.1, Chapter 24, Ill. Rev. Stat., 1959, applicable in this cause to bar this action because the said provisions of the Code are effective on a retroactive basis?

As pointed-out above, the provisions of Section 73.1, Chapter 24, Ill. Rev. Stat., 1959, have no application in this cause for the reason that no deconversion is alleged in the complaint and no zoning problem is presented.

Also, the Supreme Court of Illinois has said, in case of *Patterson* v. *City of Naperville*, 9 Ill. 2*nd*. 233, "the privilege of the individual to use his property as he pleases is subject always to a legitimate exercise of the Police Power under which new burdens may be imposed and new restrictions placed upon its use when the public welfare demands. The requirements as set-forth in the Code are properly regarded as essential to the public health and safety and welfare." And in the case of *Abbate Bros.* v. *City of Chicago*, 11 Ill. 2nd. 337, the Supreme Court held that regulations restricting the use of property as a safety measure could properly have retroactive effect, and said: "It would be a sad commentary on the law, if municipalities were powerless to compel the adoption of the best methods for protecting life in such cases simply because confessedly faulty method in use was the method provided by law at the time of its construction." Insofar as said code provisions are made expressly retroactive to existing buildings, the contentions made by Defendants cannot be sustained.

The passage and enforcement of these provisions of the Municipal Code insofar as they effect the health and safety and promote health and suppress disease are desirable and serve public policy and the welfare of the citizens. Any steps to nullify police powers under regulations similar to those before this Court under the proofs made in the face of no proofs to controvert same would have a severe consequence and without exceptions should not be entertained. Multiple Dwelling Law Regulations similar to those here in question have been enforced in *Adamec* v. *Post, Etc.*, 273 N.Y. 250. Also, it is noted that the holding of *Brennan* v. *City of Milwaukee*, 265 Wis. 56, on which the Defendants rely, has been criticized in 69 Harvard Law Review, at Page 1115, as making an undesirable ruling as to classification made by Ordinance.

The City has sustained the necessary burden of proof for recovery as to sub-paragraphs 8a, 8c, 8f, 8g, and 8h, of its complaint, since the evidence shows that the Defendants after notice have complied with Sections 8b, 8d, 8e, 8i, and 8j, these portions of the Complaint should be dismissed.

The Plaintiff is directed to present a Decree in accordance herewith, directing that a Mandatory Injunction issue to enforce Paragraphs 8a, 8c, 8f, 8g, and 8h, of Municipal Code.

/s/ *Francis P. Hanagan*
Judge of the Circuit Court,
of Cook County, Illinois.

OPINION OF THE SUPREME COURT OF ILLINOIS

(Tr. 5-11)

The City of Chicago, Appellee, v. Hymen Miller *et al.*, Appellants, 27 Ill. 2d 211.

MR. CHIEF JUSTICE SOLFISBURG delivered the opinion of the court:

The city of Chicago brought suit in the circuit court of Cook County against the defendants to compel them to make certain improvements to a building owned by them so that the building would comply with certain provisions of the municipal code of Chicago. The case was heard by the trial court without a jury. The defendants submitted no evidence, and at the conclusion of the plaintiff's evidence the court entered a decree finding that the city had proved that the defendant's building did not comply with the municipal code in certain respects and ordering the defendants to make improvements to their property so as to bring it in compliance with the code. The trial judge certified that the validity of a municipal ordinance was involved and the public interest required an appeal to this court, and the defendants have appealed.

In addition to contesting the validity of the ordinances, defendants contend that the decree of the trial court is erroneous in certain other respects, and we shall first consider these contentions. This action was brought under the authority of section 23—70.3 of the Revised Cities and Villages Act (Ill. Rev. Stat. 1959, chap. 24, par. 23—70.3) which provides, in substance, that if the appropriate official of any municipality determines upon due investigation that any building in the city fails to conform to the minimum standards of health and safety as set forth in the

applicable ordinances of the city, and the owner of the property fails, after due notice, to cause the property to conform to the ordinances, the municipality may make application to any court of competent jurisdiction for an injunction requiring compliance. The defendants argue that a prosecution by a municipality for the violation of an ordinance is a common law action in which the defendants are entitled to a trial by jury, and defendants contend that since this proceeding involves an alleged violation of a municipal ordinance that they are entitled to a trial by jury in an action at law despite the provisions of this statute. A similar contention was advanced in *Village of Spillertown* v. *Prewitt*, 21 Ill. 2d 228, where we affirmed a decree granting an injunction against the operation of a strip mine. We held that prosecutions for day-to-day violations of the ordinance prohibiting such an operation would not serve the intent of the ordinance to protect the public. We held that a court of equity had jurisdiction and that the defendant was not entitled to a trial by jury. Under this authority the city here had the power to proceed in equity even in the absence of the statute, and we therefore hold that the procedure was authorized and did not deprive the defendants of the right to trial by jury.

The defendants also argue that the city was estopped from obtaining the relief sought by its complaint. The evidence showed that this building was constructed in 1899 under a permit issued by the building department of the city of Chicago. Defendants contend that after a lapse of more than 60 years since the original construction of the building the city should be estopped from complaining about any building violations. This argument completely ignores the fact that the violations complained of in this case have nothing to do with the original erection of the building but deal with violations of the present municipal

code, which was enacted in 1949 and was made applicable to existing buildings in 1956. The mere fact that the building was originally constructed under the authority of a permit issued by the city in no way estops the city from bringing an action to compel compliance with the existing code.

In further support of the defendants' estoppel argument, they contend that the city is estopped from demanding compliance with the code by reason of the fact that the defendants purchased the building in 1957, allegedly in reliance upon certain statements by a city employee that the building did not violate the code. The defendant Hymen Miller testified that before he bought the building he went to the building department of the city and told some person in the office that he intended to buy this building and wanted to see what condition it was in. According to this defendant, he was told that it looked pretty good; that there were inspection records and they all seemed to be o.k.; and that there did not seem to be anything drastically wrong according to the records. Defendant further testified that he also inspected the building and could see no reason why he should not buy it. There was no evidence to indicate that the defendant checked the municipal code to see if the building complied with the code. Defendant testified that he had an attorney at the time of the closing of the real-estate purchase but that he did not ask his attorney to check and see whether the building complied with the code because the defendant felt that he was just as qualified as the attorney would be. It is settled that as a general rule a city cannot be estopped by an act of its agent beyond the authority conferred upon him. This general rule is qualified to enable a party to invoke the doctrine where his action was induced by the conduct of a municipal

official and where, in the absence of such relief, he would suffer a substantial loss. (*Cities Service Oil Co.* v. *City of Des Plaines*, 21 Ill. 2d 157.) In that case we held the doctrine applicable because of special circumstances which are not present here. We pointed out that the property owner there had attempted to secure a copy of the ordinance relating to service stations and that the city officials had furnished him with a copy of an ordinance that was no longer in existence and also pointed out that the property owner had expended substantial sums in the construction of the service station before the permit was revoked. We stated in that case that if one is aware of an applicable ordinance or makes no attempt to know of it, even the issuance of a permit contrary to the provisions of the ordinance does not create an estoppel. In the present case the defendants made no attempt to ascertain the applicable provisions of the code. No permit was issued and the defendants relied simply on the oral representations of an unnamed person in the building department that so far as that person could see from the file there were no violations. In *Gregory* v. *City of Wheaton*, 23 Ill. 2d 402, the property owner claimed that the city was estopped from complaining about a multiple-family use of property in a single-family zone. The city had issued a permit authorizing the construction of a stairway to a third-floor apartment and the property owner contended that the issuance of this permit estopped the city from complaining about a violation of the zoning ordinance. We held that the issuance of the permit and the actual commencing of the construction of the stairway were insufficient to take the case out of the general rule so as to make the doctrine of estoppel applicable. The facts in the present case upon which defendants seek to create an estoppel are not as persuasive as those in *Gregory*, where we held the doctrine inapplicable. We hold that the general rule is applicable to the present case and the city is not estopped.

The defendants also contend here that the city is barred by *laches*. This contention is again based upon the fact that the building had been in existence since 1899 and no action had been taken by the city to compel compliance with the building code. As we have heretofore pointed out, the original construction of the building is not involved here and it is entirely immaterial how long the building had been in existence. Furthermore, the doctrine of *laches* is not applicable to a governmental unit in the exercise of its governmental rights and powers. *People ex rel. Nudelman* v. *Superior Petroleum Co.*, 372 Ill. 546.

It is also argued that the city failed to bring itself within the terms of the statute authorizing a prosecution of this action. As we have heretofore pointed out, this statute provides for an investigation and determination by an appropriate officer of a municipality. The defendants contend that the only appropriate officer qualified to make such an investigation is the commissioner of buildings of the city of Chicago and that since the commissioner did not testify and there was no evidence that he had made a personal investigation, the required investigation and determination had not been proved. Defendants cite no authority in support of this contention and we are satisfied that it is without merit. Section 13—4 of the Chicago Municipal Code provides that the assistant commissioner of buildings shall be in charge of the city's housing enforcement program. The assistant commissioner testified that he was in charge of the investigation team which inspected the building and that the inspection was made by his authority and under his supervision. In our opinion this evidence was sufficient to establish that the investigation and determination was made by an appropriate officer of the municipality. The statute also provides that application

to a court shall be made only after due notice, and the defendants contend that the evidence here failed to establish notice. The assistant commissioner testified that there was a co-ordinated inspection and notices were sent. The defendants argue that this testimony is insufficient to establish that the notice required by the statute was given in that it does not show the date upon which the notice was given or the person or persons upon whom the notice was served and does not establish the content of the notice. The statute does not prescribe the form of the notice, and in our opinion the uncontroverted testimony that notices were sent is sufficient to establish that the city complied with the notice requirement.

We turn now to a consideration of the principal issue, which is the validity of the ordinances involved here. In general, these sections of the municipal code impose certain requirements with respect to ventilation of kitchens, the sufficiency of the sanitary facilities, the venting of certain plumbing fixtures, and the fire-resistant qualities of the walls, partitions and doors. The code provides that these provisions are applicable to all buildings, including those built before the effective date of the ordinance.

The defendants contend that the retroactive provisions are in direct conflict with section 73—1 of the Revised Cities and Villages Act. (Ill. Rev. Stat. 1959, chap. 24, par. 73—1.) This section is found in article 73 entitled "Special Powers—Zoning" and has been recognized as the legislative authority for the enactemnt of zoning ordinances by municipalities. (*People ex rel. Skokie Town House Builders, Inc.* v. *Village of Morton Grove,* 16 Ill. 2d 189; *Brown* v. *Board of Appeals,* 327 Ill. 644; *City of Aurora* v. *Burns,* 319 Ill. 84.) The section contains, in addition to many other powers, a provision authorizing a city to fix standards to which buildings or structures shall con-

form, and also provides that the powers conferred by the section shall not be exercised so as to deprive the owner of an existing property of its use or maintenance for the purpose to which it was lawfully devoted at the time of the enactment of the ordinance. The defendants contend that this provision prevents the application of building requirements to existing buildings. We cannot agree. The provision authorizing the fixing of standards is obviously designed to implement the city's right to enact comprehensive zoning ordinances and the provision with respect to existing uses serves as a protection for nonconforming uses in existence at the time the zoning ordinance is enacted. No zoning questions are involved in the present case and this section is inapplicable.

The legislative authority for the imposition of building requirements such as are involved here is found in article 23 of the Revised Cities and Villages Act granting general powers to the corporate authorities and particularly in sections 23—70, 23—72 and 23—81 of that article. (Ill. Rev. Stat. 1959, chap. 24, pars. 23—70, 23—72, 23—81.) In the exercise of the powers conferred by these sections, the city may impose reasonable building requirements for the protection of the health and safety of the city inhabitants. (*Father Basil's Lodge* v. *City of Chicago*, 393 Ill. 246.) The real issue involved here is whether these building requirements can constitutionally be made applicable to existing buildings.

This issue has previously been resolved by the decisions of this court. In *Abbatte Bros., Inc.* v. *City of Chicago*, 11 Ill. 2d 337, we considered whether the city of Chicago could constitutionally require elevators in existing buildings to be modified so as to include a safety interlock device. After reviewing the previous decisions of this court and the decisions of other jurisdictions, we held that mu-

nicipal corporations in the exercise of their police power may constitutionally require changes in existing structures for the protection of health and safety, provided that it appears that the public welfare demands such application and that the property owners do not suffer unreasonable exactions as contrasted with the resulting public benefits. The testimony in the present case, none of which was rebutted, showed that all of the provisions involved here tended to promote the public health and safety. Defendants introduced no evidence tending to prove that the cost of compliance would be unreasonable compared to the benefits accruing to the public. We hold that the city in the exercise of its police powers as conferred by the legislature had the authority to enact the provisions involved here and also had the authority to make such provisions applicable to existing buildings.

The defendants also argue that one of these provisions, dealing with the number of bathrooms in a building, is unconstitutional because it is based upon an arbitrary and improper classification. This section provides that the occupants of not more than two family units which are located in the same dwelling may share a single bathroom. The building contains 22 units, 7 of which have private bathrooms, and 15 of which share 5 other bathrooms. The defendants contend that classification according to the number of rooms rather than to the number of persons who are to use the bathroom is an unnatural classification and is purely arbitrary. The principal authority cited in support of this contention is *Brennan* v. *City of Milwaukee*, 265 Wis. 56, where the Supreme Court of Wisconsin held an ordinance unconstitutional which provided that 2 apartments of not more than 3 rooms each could share a single bathtub or shower, while larger apartments were required

to have their own bath facilities. The Wisconsin court held that the classification by the number of rooms rather than by the number of persons using the facilities was an arbitrary and unreasonable classification. But it has been pointed out that the Wisconsin court in the *Brennan* case apparently ignored the probable relation between apartment size and occupancy and also failed to give proper weight to the legislative judgment in imposing classifications. (69 Harvard Law Review 1115-1121.) The decisions of this court make it clear that the question of whether there is any connection between a given ordinance and the police power claimed to be exercised thereby and the question of whether any classification set forth in the ordinance is reasonable is primarily a matter for legislative determination, and the classification adopted by the legislation will not be disturbed by the courts unless it is manifestly unreasonable. (*Father Basil's Lodge* v. *City of Chicago*, 393 Ill. 246.) A legislative classification need not be scientific, logical, or consistent but need only have a reasonable basis when considered with reference to the purpose of the legislature. (*Hansen* v. *Raleigh*, 391 Ill. 536.) We are of the opinion that the classification adopted by the city council bears a reasonable relation to the purpose sought to be accomplished and is not manifestly unreasonable. An ordinance is presumed to be valid and the burden is upon the party attacking the ordinance to show its invalidity. (*City of Decatur* v. *Chastain*, 19 Ill. 2d 204.) We are of the opinion that the defendants have failed to overcome the presumptive validity of this ordinance.

The final contention advanced by the defendants on this appeal is that the decree of the trial court finding that the defendants' building did not comply with the various provisions of the code is not sustained by the evidence. We do not believe that it would serve any purpose other

than to prolong an already lengthy opinion to discuss the evidence in detail. This case was heard by the trial court without a jury and his findings on questions of fact will not be disturbed unless they are contrary to the manife ' weight of the evidence. (*Warner* v. *Gosnell,* 8 Ill. 2d 24.) The defendants introduced no evidence at the trial of this cause and the city's evidence therefore stands uncontradicted. We have reviewed the evidence as set forth in the record and we are satisfied that the decree of the trial court is fully supported by the evidence.

We have considered all of the assertions of error advanced by the defendants and are of the opinion that the decree of the trial court was correct. The decree is therefore affirmed.

Decree affirmed.

APPENDIX II

ORDINANCES OF THE CITY OF CHICAGO

The Municipal Code of the City of Chicago provides:

Building Inspection

46-2. The commissioner of buildings, and his assistants shall make an annual inspection of * * * all buildings over one story in height, except single dwellings, multiple use buildings consisting of business and dwelling units two stories or less in height, and multiple dwellings three stories or less in height, unless such multiple dwellings are lodging or rooming houses with sleeping accommodations for twenty or more persons. . . .

* * *

46-5. Where the result of such inspection shall show that such building fails in any respect to comply with the building provisions of this code, it shall be the duty of the commissioner of buildings to notify the owner, agent, lessee, or occupant of such building to this effect and to specify wherein such building fails to comply with the requirements of the building provisions of this code; and it shall thereupon become the joint and several duty of such owner, agent, lessee, or occupant to proceed forthwith to make whatever changes or alterations may be necessary to make such building comply in all respects with the requirements of the building provisions of this code, and to complete such changes and alterations within thirty days after the receipt of such notice.

* * *

Multiple Dwellings

48-2.2. Residential Units designed or used for two or more family units or designed or used for sleeping accommodations, other than family units, for more than ten persons shall be classified as Class A-2. Multiple dwellings, shall include, among others, the following:

Apartment Buildings	Hotels
Boarding Houses	Lodging Houses
Clubs	Monasteries
Convents	Motel
Dormitories	Rooming Houses
Fraternities	Tourist Houses

• • •

Residential Units

52-1. Every building or part of a building hereafter designed, erected, altered or converted for the purposes of a Residential Unit as defined in section 48.2 shall comply with the special provisions of this chapter and also with the general provisions of this code pertaining to buildings . . .

52-2. (a) In all Multiple Dwellings every dwelling unit shall be separated from all other parts of the building by walls or partitions of non-combustible construction, or of construction consisting of wood studs with metal lath and plaster, or an equivalent non-combustible surface material, or with perforated gypsum board and plaster, or an equivalent non-combustible surface material, and shall provide fire resistance of not less than one hour.

(b) In Multiple Dwellings partitions, floor construction and ceiling construction enclosing public corridors shall be of non-combustible construction, or shall be constructed of wood joists or wood studs with metal lath and plaster, or

an equivalent non-combustible surface material, or perforated gypsum board and plaster, or an equivalent non-combustible surface material, and shall provide fire resistance of not less than one hour.

Any openings shall be protected by doors having fire resistance of not less than a 1¾" solid flush panel door with a rebated frame of solid material 1¾" thick or metal frames of not less than #16 gauge.

• • •

Sanitation

66.5. In every building or structure hereinafter erected toilet fixtures shall be provided complying with the provisions of sections 66-5.1 to 66-5.10, inclusive.

66-5.1. *Minimum Plumbing Fixture Requirements.* Except in auxiliary buildings, there shall be not less than one toilet room containing one water closet and one lavatory in every building used for human occupancy. Additional fixtures shall be provided as required in this chapter.

• • •

66-5.7. *Special Fixture Requirements.*

(a) Residential Units.

(1) Every family unit shall contain not less than one water closet, one lavatory and one tub or shower. Every kitchen shall contain not less than one sink.

(2) In Multiple Dwellings not less than one water closet, one lavatory and one tub or shower shall be provided to serve not more than ten persons.

• • •

66-5.8. *Location of Fixtures.*

• • •

(b) In Multiple Dwellings and Institutional Units toilet room facilities shall be provided on every floor having sleeping accommodations.

• • •

66-5.9. *Location of Toilet Rooms.* Except in family units, no bathroom or toilet room shall open directly into a room where food is prepared, stored or served without an intervening vestibule.

66-5.10. *Toilet Room Construction.* Rooms or spaces containing water closets, urinals, bath tubs, or showers shall have floors of non-absorbent materials and shall be entirely separated from other rooms by solid partitions extending from floor to ceiling without openings except as required for access or mechanical ventilation.

• • •

Existing Buildings included in Housing Code

78-10.2. *Fire Protection in Converted Residential Units.* Conversions and enlargement of residential structures as provided in the preceding section shall be subject to the following requirements:

(a) New or existing stairways shall be vertically separated from all other parts of the building with partitions providing fire resistance of not less than one hour.

(b) The floor construction over the basement shall be of construction providing fire resistance of not less than one-half hour.

(c) Furnace or other heating plants shall be separated from dwelling units by partitions providing fire resistance of not less than one-half hour.

(d) Existing walls or partitions may be altered or replaced with material allowed in the original structure except that partitions between dwellings and those enclosing stairs and public corridors shall comply with the requirements of section 52.2.

(e) Except where a single exit complying with all requirements of section 67.4 is permitted, each dwelling shall have access to two vertical means of exit. Existing stairs may be of wood. New stairs shall comply with the requirements of chapter 67.

(f) Stairways shall be enclosed as required in section 62.3. Soffits of stairs shall be protected as required in section 67-10.4.

• • •

Applicability of Housing Code

78-11.1. Sections 78-11 through 78-20 of this Chapter are referred to within said sections as the housing code of the City of Chicago. This housing code is applicable to occupancy for residential purposes of any building, whether or not such building was erected, altered or converted in full or substantial compliance with ordinances in force at the time of its erection, alteration or conversion and whether or not such building was erected, altered or converted prior to the effective date of this housing code. Whenever any such ordinance imposes higher standards of health and safety than the standards imposed by this housing code, this housing code does not make a continued violation of such ordinance legal, nor does this housing code permit any building which complies with such ordinance to be altered or converted, as to either structure or occupancy, to conform to any lower standards imposed by this housing code. Every building constructed, altered or converted after the effective date of this housing code shall comply with the applicable provisions of the building

provisions of this code in effect at such time, and such a building shall not be occupied for residential purposes, unless it complies also with any higher standards imposed by this chapter. The requirements imposed by this housing code shall be in addition to other applicable requirements for existing buildings imposed by other provisions of this chapter.

• • •

Water Closet

78-13.1. Every family unit (except as provided in sections 78-13.4 and 78-13.9) shall contain within its walls a room, separate from the habitable rooms, which affords privacy and which is equipped with a flush water closet.

Lavatory

78-13.2. Every family unit (except as provided in sections 78-13.4 and 78-13.9) shall contain within its walls a lavatory basin located in the same room as the required water closet or as near to that room as practicable.

Bathtub or Shower

78-13.3. Every family unit (except as provided in section 78-13.4 and 78-13.9) shall contain within its walls a room, separate from the habitable rooms, which affords privacy to a person in the room and which is equipped with a bathtub or shower.

Sharing Sanitary Facilities—Limitations

78-13.4. The occupants of not more than two family units which are located in the same dwelling may share a single flush water closet, a single lavatory basin, and a single bathtub or shower if

(a) the facilities to be shared are within a room or rooms on the same floor as the family units and are accessible to the occupants of each family unit without going through the family unit of another person or outside the dwelling; and

(b) neither of the two family units contains more than two habitable rooms nor more than 500 square feet of floor area, excluding from the number of rooms and from floor area any kitchen of less than 70 square feet of floor area).

• • •

Maintenance of Sanitary Facilities

78-13.6. Every kitchen sink, lavatory basin and bathtub or shower required by this section shall be in good working condition and properly connected to an approved water and sewage system.

• • •

Plumbing Provisions

82-2. For the purposes of this chapter and chapter 83 of this code, terms and words shall be construed as defined in this section.

• • •

New and existing. The word "new" used in connection with a building, structure or plumbing system is equivalent to the phrase "constructed since August 3, 1938," unless a new provision is made otherwise and the word "existing" is equivalent to the phrase "in existence on August 3, 1938." If neither of these qualifying words is used, the provisions of this chapter and chapter 83 of this code shall be construed as applying both to "new" and "existing" structures or conditions.

• • •

82-12. Every new and existing dwelling or place of employment located on a lot abutting on a public way, granted easement, or thoroughfare in which a public sewer is available, shall be provided with a plumbing system, including water closet facilities connected to such sewer.

APPENDIX III

JUDGMENT OF THE SUPREME COURT OF ILLINOIS
(Tr. 12)

Be it remembered, that, to-wit: on the 1st day of February, 1963, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

CITY OF CHICAGO, a municipal corporation, *Appellee,*	
No. 37328 vs.	Appeal from Circuit Court Cook County 61 C 10467
HYMEN MILLER, MILDRED MILLER, his wife, and CHICAGO TITLE AND TRUST COMPANY, as Trustee under Document #16897045, *Appellants.*	

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the decree aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

THEREFORE, it is considered by the Court that the decree of the Circuit Court of Cook County aforesaid, be affirmed in all things and stand in full force and effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said appellee recover of and from the said appellants costs by it in this behalf expended, to be taxed, and that it have execution therefor.

PROOF OF SERVICE OF JURISDICTIONAL STATEMENT

I, Harry G. Fins, counsel for appellants herein and a member of the Bar of the Supreme Court of the United States, hereby certify that I served two copies of the foregoing Jurisdictional Statement on the adverse party, the City of Chicago, a municipal corporation, by delivering same to John C. Melaniphy, Corporation Counsel of the City of Chicago, at 511 City Hall, Chicago 2, Illinois, on the ..... day of July, 1963.

.....

HARRY G. FINS
77 West Washington Street
Suite 1521
Chicago 2, Illinois
Counsel for Appellants

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IN THE

Supreme Court of the United States

OCTOBER 1963 TERM.

No. 260

HYMEN MILLER, MILDRED MILLER, HIS WIFE, AND CHICAGO TITLE AND TRUST COMPANY, AS TRUSTEE UNDER DOCUMENT No. 16897045,

Appellants,

vs.

CITY OF CHICAGO, A MUNICIPAL CORPORATION,

Appellee.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

MOTION TO DISMISS.

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THE SUPREME PRINTING COMPANY, CHICAGO 56

IN THE

Supreme Court of the United States

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Appellee in the above-entitled case moves to dismiss on the ground that the question presented is so unsubstantial as not to need further argument.

STATEMENT.

Appellants' Jurisdictional Statement is replete with misstatements of fact.

Although such misstatements throw no light on the constitutional question appellants attempt to raise herein, appellee will not permit this court to be misled thereby.

Appellants state (Jurisdictional Statement, p. 2) that appellee sought "a mandatory injunction to enforce a building ordinance of the City of Chicago (Tr. 3; Abst. 1-9)."

The mandatory injunction sought by appellee was not to enforce "a building ordinance" but was for the purpose of making appellants' building comply with the minimal sanitary, fire and safety requirements of appellee's building code (Tr. 3, Abst. 3.)

Such suit was brought pursuant to a statute of Illinois (Ill. Rev. Stat. 1959, chap. 24, par. 23-70.3, Tr. 3, Abst. 3), which empowers Illinois municipalities to proceed by injunction to make an owner of any building or structure that "fails to conform to the minimum standards of health and safety as set forth in the applicable ordinance of such municipality . . . so to conform."

The evidence herein discloses that a group of appellee's building inspectors on April 25, 1961 (Tr. 3, Abst. 22, 27, 28), found that appellants' building violated appellee's building code in that (1) the walls and partitions separating the dwelling units, the walls and partitions separating the dwelling units from the public corridors, and the doors separating the dwelling units from the public corridors failed to provide proper fire resistance (Tr. 3, Abst. 22-26, 45-52); (2) certain kitchens failed to provide proper ventilation (Tr. 3, Abst. 29); (3) certain bathrooms were not equipped with the required lavatories (Tr. 3, Abst. 27, 28, 29); (4) insufficient number of bathrooms (Tr. 3, Abst. 29, 30); and (5) required vents absent from certain laundry tubs and bathrooms (Tr. 3, Abst. 27, 28).

Appellants not only presented no evidence in the trial court to contradict the foregoing evidence but offered no evidence (Tr. 3, Abst. 66).

Under Statement of The Case (Jurisdictional State-

ment, p. 5), appellants state that an ordinance of appellee required appellee to make an annual inspection of appellants' building. Appellants do not identify such ordinance but indicate that it is shown in Appendix II. Appendix II, p. 23a, shows section 46-2, which is evidently the ordinance referred to.

Such ordinance exempts from an annual inspection "multiple dwellings three stories or less in height." Appellants' building is three stories high and is devoted to multiple dwelling use, having 22 dwelling units (Jurisdictional Statement, p. 7). Therefore appellants' building was not subject to the annual inspection provisions of sections 46-2.

Appellants state (Jurisdictional Statement, p. 5), that defendant Hymen Miller in 1957 went to appellee's building department and was advised by the person in charge "that there were inspection records and that the building was in good order (Tr. 3, Abst. 54-55). In reliance thereon, Miller purchased the building for $40,000 (Tr. 3, Abst. 56)."

Hyman Miller was called as an adverse witness by appellee (Tr. 3, Abst. 53) and never testified that he spoke to the person in charge of appellee's building department. He testified that he could not name or identify the two people in the building department that he talked to (Tr. 3, Abst. 56).

Tr. 3, Abst. 56, does not show that Miller purchased the building on the representation of anyone in appellee's building department. It merely shows that Miller paid $40,000 or $41,000 for the building.

Under Federal Question Is Substantial (Jurisdictional Statement, p. 7), appellants state that the building "has 12 bathrooms and is occupied by 29 persons (Tr. 3, Abst. 29, 31). Thus, there is an average of more than one bath-

room for each 2½ persons. The general requirement, nation-wide, is one bathroom for 10 persons (Tr. 3, Abst. 44)."

Tr. 3, Abst. 31, shows that 7 of appellants' dwelling units each had its own private bathroom and that the other 15 dwelling units shared 5 bathrooms, thus there was only 1 bathroom for each 3 dwelling units; and the number of people using such bathroom depended on the number of people living in such 3 dwelling units. At the rate of 1 person per such dwelling units, the minimum number would be 3 people, but such dwelling units usually contain 2 or more people so that the minimum would be at least 2 per dwelling unit or a minimum of 6 people for each 3 units.

Tr. 3, Abst. 44, shows that Eugene T. Hoban, a doctor in appellee's board of health, testified that nation-wide, generally one bathroom was required for *8 to 10 people.*

The trial court found (Jurisdictional Statement, p. 3a), "That evidence also tends to show that the original construction of the building had been altered without obtaining any permit from the Building Department of the City of Chicago, Illinois, and further tends to show that the original construction of the building had been altered and increased from six (6) to twenty-two (22) dwelling units."

Appellee's Housing Code, which is part of appellee's building code, was passed June 20, 1956, and became effective January 1, 1957. It applies specifically to buildings devoted to "residential purposes" and was designed to bring all such buildings into compliance with minimal sanitary, fire and safety requirements of appellee's building code (Jurisdictional Statement, p. 27a, section 78-11.1).

Appellee's Housing Code does not prohibit the residential use of a building. It only attempts to have such build-

ing comply with said code in order that the occupants thereof shall have the minimal sanitary, fire and safety protection to which they are entitled and which minimal requirements appellee has the duty to require.

Appellants cite *Dobbins* v. *Los Angeles*, 195 U. S. 223 (Jurisdictional Statement, p. 11), as being applicable herein. Such case is not in point. It did not involve a building code requiring minimal sanitary, fire and safety protection but was in the nature of a zoning ordinance prohibiting a gas works within a certain district.

Appellants practically base their constitutional argument on *Brennan* v. *City of Milwaukee*, 265 Wis. 56 (Jurisdictional Statement, p. 8).

Both the trial courts opinion (Jurisdictional Statement, p. 12a) and the Supreme Court of Illinois opinion (Jurisdictional Statement, p. 20a), show that such opinion is erroneous and contrary to the general rule relative to legislative classification.

Appellants do not contend that appellee's building code is not an exercise of appellee's police power. The exercise of such police power has always been looked upon liberally by this court.

In *Queenside Hills Realty Co.* v. *Saxl*, 328 U. S. 80 (1946), this court upheld a statute of the State of New York which provided that existing buildings had to install certain new fire prevention equipment. It was there claimed that the building in question had a market value of about $25,000 and that the cost of complying with the statute would be about $7,000. [Note: In the case at bar, although appellants did not put in any evidence to show how much it would cost them to bring their building in compliance with the minimal sanitary, fire and safety requirements of appellee's building code, they claim (Jurisdictional Statement, p. 11). "It is common knowledge that rebuild-

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ing of walls and partitions of an established structure requires a major change and involves great expenditure. To require the owner of an established building to rebuild it in accordance with subsequent enactments involves the deprivation of a property right, in violation of 'due process of law.' "]

In answer to the contention in the *Queenside* case and appellants' similar contention herein, this court said (328 U. S. at 82):

> "Little need be said on the due process question. We are not concerned with the wisdom of this Legislation or the need for it. [Citation.] Protection of the safety of persons is one of the traditional uses of the police power of the State. Experts may differ as to the most appropriate way of dealing with fire hazards in lodging houses. Appellant, indeed, says that its building, far from being a fire-trap, is largely fireproof; and to the extent that any fire hazards exist, they are adequately safeguarded by a fire alarm system, constant watchman service, and other safety arrangements. But the legislature may choose not to take the chance that human life will be lost in lodging house fires and adopt the most conservative course which science and engineering offer. It is for the legislature to decide what regulations are needed to reduce fire hazards to a minimum. . . . *But in no case does the owner of property acquire immunity against exercise of the police power because he constructed it in full compliance with the existing laws.*" (Emphasis added.)

In *Goldblatt* v. *Town of Hempstead*, 369 U. S. 590 (1962), the Town of Hempstead enacted an ordinance regulating dredging and pit excavating on property within its limits. Such ordinance prevented excavating below the water table and the enclosure of such excavation. It was claimed that the ordinance prohibited a beneficial use to which the property had previously been devoted and resulted in a depriva-

tion of property for public use without just compensation therefor. This court, held (p. 593):

> ". . . A prohibition simply upon the use of property for purposes that are declared by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit."

Appellants' building was constructed in 1899 (Jurisdictional Statement, p. 5). The entire purpose of appellee's building code and the statute of Illinois which enabled appellee to bring this action for a mandatory injunction, is to compel owners of such sub-standard buildings as appellants, to bring their buildings within the minimal sanitary, fire and safety requirements of today's living conditions, to the end that people living in such buildings, will have the same health and safety protection enjoyed by people living in standard buildings.

There can be no better or higher exercise of the police power than that exercised by appellee herein in order to bring about fit living conditions for the public residing in buildings devoted to residential use.

Such exercise of the police power does not violate any constitutional guarantees. It guarantees that the public have safe, healthful places to live.

The opinion of the trial court (Jurisdictional Statement, p. 12a), sums up the issue herein quite well. It states:

> "The passage and enforcement of these provisions of the Municipal Code insofar as they effect the health and safety and promote health and suppress disease are desirable and serve public policy and the welfare of the citizens. Any steps to nullify police powers under regulations similar to those before this Court under the proofs made in the face of no proofs to controvert same would have a severe consequence and without exceptions should not be entertained."

Appellee respectfully submits that the appellants present no substantial question for the decision of this court and prays that its motion to dismiss the appeal be allowed.

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